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3 **UNITED STATES DISTRICT COURT**
4 **DISTRICT OF NEVADA**

5 * * *

6 WENDELL DWAYNE O'NEAL,

7 Plaintiff,

8 v.

9 TERRI ALBERTSON, et al.,

10 Defendants.

Case No. 2:17-cv-03025-JAD-DJA

11 **SCREENING ORDER**

12 Presently before the Court is pro se Plaintiff Wendell Dwayne O'Neal's application to
13 proceed *in forma pauperis* (ECF No. 1), filed on December 8, 2017.¹ This matter is also before
14 the Court on Plaintiff's Motion for Order (ECF No. 11), filed on April 11, 2019.

15 **I. IN FORMA PAUPERIS APPLICATION**

16 Plaintiff has submitted the declaration required by 28 U.S.C. § 1915(a) showing an
17 inability to prepay fees and costs or give security for them. Accordingly, Plaintiff's request to
18 proceed *in forma pauperis* will be granted.

19 **II. SCREENING COMPLAINT**

20 Upon granting a request to proceed *in forma pauperis*, a court must screen the complaint
21 under 28 U.S.C. § 1915(e)(2). In screening the complaint, a court must identify cognizable
22 claims and dismiss claims that are frivolous, malicious, fail to state a claim on which relief may
23 be granted, or seek monetary relief from a defendant who is immune from such relief. 28 U.S.C.
24 § 1915(e)(2). Dismissal for failure to state a claim under § 1915(e)(2) incorporates the standard
25 for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). *Watson v. Carter*,

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27 ¹ This matter was originally recommended for dismissal because Plaintiff was declared a vexatious
28 litigant in another case in this district. The Ninth Circuit vacated the District Court's order to the extent it
declared him to be a vexatious litigant. Therefore, the Court vacated its recommendation and this matter is
now ripe for a decision. (ECF No. 10).

1 668 F.3d 1108, 1112 (9th Cir. 2012). To survive § 1915 review, a complaint must “contain
2 sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.”
3 *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). The court liberally construes pro se complaints
4 and may only dismiss them “if it appears beyond doubt that the plaintiff can prove no set of facts
5 in support of his claim which would entitle him to relief.” *Nordstrom v. Ryan*, 762 F.3d 903, 908
6 (9th Cir. 2014) (quoting *Iqbal*, 556 U.S. at 678).

7 In considering whether the complaint is sufficient to state a claim, all allegations of material
8 fact are taken as true and construed in the light most favorable to the plaintiff. *Wylar Summit P’ship*
9 *v. Turner Broad. Sys. Inc.*, 135 F.3d 658, 661 (9th Cir. 1998) (citation omitted). Although the
10 standard under Rule 12(b)(6) does not require detailed factual allegations, a plaintiff must provide
11 more than mere labels and conclusions. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007).
12 A formulaic recitation of the elements of a cause of action is insufficient. *Id.* Further, a Court may
13 dismiss a claim as factually frivolous if its allegations are “clearly baseless, a category
14 encompassing allegations that are fanciful, fantastic, and delusional.” *Denton v. Hernandez*, 504
15 U.S. 25, 32–33 (1992) (internal citations and punctuation omitted). Unless it is clear the
16 complaint’s deficiencies could not be cured through amendment, a pro se plaintiff should be given
17 leave to amend the complaint with notice regarding the complaint’s deficiencies. *Cato v. United*
18 *States*, 70 F.3d 1103, 1106 (9th Cir. 1995). Allegations of a *pro se* complaint are held to less
19 stringent standards than formal pleadings drafted by lawyers. *Hebbe v. Pliler*, 627 F.3d 338, 342
20 & n.7 (9th Cir. 2010) (finding that liberal construction of *pro se* pleadings is required after *Twombly*
21 and *Iqbal*).

22 Here, Plaintiff submitted a complaint (ECF No. 1-1), amended complaint (ECF No. 3),
23 and addendum to the amended complaint (ECF No. 4). As Plaintiff was not given leave to file an
24 amended complaint or an addendum, the Court will only screen the original complaint. In
25 general, Plaintiff appears to allege that the DMV’s employees failed to take any action against
26 Roadrunner Rentals, Inc. regarding its transport of California registered automobiles and sale of
27 those automobiles via Craigslist. Plaintiff appears to allege that the Court has federal question
28 jurisdiction as he attempts to state a due process violation via 42 U.S.C. § 1983. Section 1983

1 creates a path for the private enforcement of substantive rights created by the Constitution and
2 Federal Statutes. *Graham v. Connor*, 490 U.S. 386, 393-94 (1989). To the extent that Plaintiff is
3 seeking to state a claim under Section 1983, he “must allege the violation of a right secured by the
4 Constitution and the laws of the United States, and must show that the alleged deprivation was
5 committed by a person acting under color of law.” *West v. Atkins*, 487 U.S. 42, 48-49 (1988). A
6 person acts under “color of law” if he “exercise[s] power possessed by virtue of state law and
7 made possible only because the wrongdoer is clothed with the authority of state law.” *West*, 487
8 U.S. at 49. Plaintiff names a law firm, Lewis Brisbois, as a defendant, which is a private entity
9 and not subject to a Section 1983 claim.

10 Further, Plaintiff appears to name the Nevada DMV and individual DMV employees as
11 defendants. However, a municipal liability claim under Section 1983 proceeds only if a
12 municipality causes a constitutional violation through a policy or custom. *See Harper v. City of*
13 *Los Angeles*, 533 F.3d 1010, 1024–25 (9th Cir. 2008). Municipal entities may be held directly
14 liable, but not on the basis of respondeat superior. *Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658,
15 91 (1978). In other words, a municipality cannot be held liable only because it employs a person
16 who allegedly violated the constitution. *Id.* at 691. “A plaintiff seeking to impose liability on a
17 municipality under § 1983 [must] identify a municipal policy or custom that caused the plaintiff’s
18 injury.” *Id.* (citation and internal quotation marks omitted). A municipal employer is not liable
19 for the wrongful conduct of its employees and agents even if they are acting in the course and
20 scope of their employment. *See Bd. of Cty. Comm’rs v. Brown*, 520 U.S. 397, 403, 117 S.Ct.
21 1382, 137 L.Ed.2d 626 (1997); *Connick v. Thompson*, 563 U.S. 51, 60, 131 S.Ct. 1350, 179
22 L.Ed.2d 417 (2011) (explaining that to impose liability on a local government under § 1983,
23 plaintiffs must prove that an “action pursuant to official municipal policy” caused their injury);
24 *Sandoval v. Las Vegas Metro. Police Dep’t*, 756 F.3d 1154, 1167–68 (9th Cir. 2014) (same).
25 Plaintiff’s amended complaint has not made the requisite showing. Although it is not clear that
26 the deficiencies identified can be cured, the Court will allow Plaintiff an opportunity to file an
27 amended complaint to the extent he believes that he can state a claim.

1 If Plaintiff chooses to file an amended complaint, the document must be titled "Amended
2 Complaint." The amended complaint must contain a short and plain statement describing the
3 underlying case, the defendant(s) involvement in the case, and the approximate dates of its
4 involvement. *See* Fed. R. Civ. P. 8(a)(2). Although the Federal Rules of Civil Procedure adopt a
5 flexible pleading standard, Plaintiff still must give defendants fair notice of his claims against
6 them and his entitlement to relief.

7 Additionally, Plaintiff is advised that if he files an amended complaint, the original
8 complaint (ECF No. 1-1) no longer serves any function in this case. As such, the amended
9 complaint must be complete in and of itself without reference to prior pleadings or other
10 documents. The Court cannot refer to a prior pleading or other documents to make Plaintiff's
11 amended complaint complete.

12 **III. CONCLUSION**

13 IT IS THEREFORE ORDERED that Plaintiff's Application for Leave to Proceed *In*
14 *Forma Pauperis* (ECF No. 1) is GRANTED. Plaintiff will not be required to pay the filing fee in
15 this action. Plaintiff is permitted to maintain this action to conclusion without the necessity of
16 prepayment of any additional fees or costs or the giving of a security for fees or costs. This order
17 granting leave to proceed *in forma pauperis* does not extend to the issuance of subpoenas at
18 government expense.

19 IT IS FURTHER ORDERED that the Clerk of the Court must file Plaintiff's complaint
20 (ECF No. 1-1).

21 IT IS FURTHER ORDERED that the complaint (ECF No. 1-1) is DISMISSED without
22 prejudice for failure to state a claim upon which relief can be granted, with leave to amend.

23 IT IS FURTHER ORDERED that plaintiff shall have until **November 18, 2019**, to file an
24 amended complaint. Failure to file an amended complaint will result in a recommendation that
25 this case be dismissed.

26 DATED: October 21, 2019

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28 DANIEL J. ALBREGTS
UNITED STATES MAGISTRATE JUDGE